

Title 38 Decision Paper
Department of Veterans Affairs (VA)
Edward Hines, Jr., Hines, Illinois

FACTS

In December 2018, the Chief of Medicine Service at the Edward Hines Jr. VA Hospital (Medical Center) issued revised performance pay standards for the physician employees in the Medicine Service line entitled "Performance Pay Measures (FY 19)". (Attachment 3). The Performance Pay Measures were revised to emphasize "quality of care criteria" and "special contributions." Id.

On January 11, 2019, the American Federation of Government Employees (AFGE), Local 781 (Union) filed a Step 2 Grievance concerning performance pay guidelines, which stated that the revised Performance Pay Measures violated the VA-AFGE Master Collective Bargaining Agreement (VA-AFGE Master Agreement), performance pay rules outlined in 38 U.S.C. § 7431, and VA policy in VA Handbook 5007, Part IX, paragraph 12. (Attachment 2). The Union made the following charges in the grievance:

1. The Agency may not diminish or withhold performance pay awards based on irrelevant concerns such as the hospital's budget.
2. The Agency may not diminish or withhold performance pay based on irrelevant concerns such as physician misconduct.
3. The Agency may not prevent employees from challenging the criteria in its revised performance pay standards.
4. The Agency did not notify the Union in advance to the changes to performance pay guidelines.

Id.

On January 29, 2019, a Step 2 Grievance meeting was held between representatives of the Union and members of management. (Attachment 3). Charges 2 and 4, covering the issues of references to physician misconduct and advance notice of the changes to performance pay criteria, were resolved during the grievance meeting. Id. A written response was provided to the Union on February 6, 2019, noting the Union's grievance was sustained in part and denied in part. Id. In the response, management denied the first and third charges, covering the references to hospital budget and employee challenges to the criteria in the revised performance pay standards respectively. Id. The denials were based on a disagreement over the interpretation of the policy in VA Handbook 5007, Part IX. Id. Management noted that the basis of the Union's grievance was focused on the amounts of performance awards being diminished. Id. However, management noted that the amounts listed in VA Handbook 5007, "up to \$15,000 or percentage amount listed," reflected the maximum amounts permitted and there was no guarantee employees would receive that amount. Id. Management disagreed that amounts of awards were being "diminished" in any way and noted that some of the amounts listed in the performance pay standards were illustrative (i.e. \$5000). Id. To avoid further misunderstanding, management agreed to remove the

“illustrative” references. Id. The response further noted that per Article 55, Section 1 of the VA-AFGE Master Agreement, “[c]ompensation is excluded from negotiations under 38 U.S.C. § 7422.” Id.

On February 21, 2019, the Union filed a Step 3 Grievance which contained the following charge, “The Agency May Not Diminish or Withhold Performance Pay Based on Irrelevant Concerns Such as the Hospital’s Budget; it is Insufficient for the Agency to Simply Delete the Problematic Rules from the PPM.” (Attachment 4). In the grievance, the Union acknowledged that the performance pay criteria document had been updated to remove the reference to physician misconduct and to budget. Id. However, the Union then noted that the Agency did not respond to the arguments regarding Charge #3, challenges to the pay criteria by employees, and further did not address the arguments regarding VA Handbook 5007, which is entitled “Pay Administration”, and 38 U.S.C. § 7431, which is entitled “Pay”. Id. To remedy the grievance, the Union requested the Agency “fulfill its duty to respond to challenges to the new criteria because they are not, in fact, barred under § 7422.” Id. The Union reiterated that the Agency “may not use the hospital’s budget to diminish or withhold performance pay from any employee.” Id.

On March 7, 2019, a Step 3 Grievance meeting was held between the representatives of the Union and management. (Attachment 5). A written response was provided to the Union on March 29, 2019. Id. The response noted that during the meeting, management explained the process for performance pay awards – Service Chiefs made assessments of individual performance based on goals and then executed the awards from their budgets based on the performance pay not to exceed the amounts listed in policy. Id. While no limit is placed on the amounts authorized within policy, the “pool of available funds is not unlimited.” Id. The parties agreed that the remaining issue from the grievance was the following: “Can the hospital use a pool of money or budget to distribute performance pay awards for physicians and dentist?” Id. The Medical Center denied the portion of the grievance regarding pay limitations but agreed to “revise its processes as well as determine and document any pay limitations from the maximum allowable amount within the first 90 days of the performance period.” Id. Once the proper procedures were determined for the budgetary issue, management noted that the pay setting portion of the grievance was covered by 38 U.S.C. § 7422. Id. In support of the response, the Medical Center provided a copy of the “FAQ’s for VHA Physician and Performance Pay”. Id.

On April 24, 2019, the Union invoked arbitration on the grievance. (Attachment 6). The Union cited to Article 27 of the VA-AFGE Master Agreement, 38 U.S.C. § 7431, and “the VA Handbook’s rules regarding performance pay awards” as the basis for invoking arbitration.¹ Id.

¹ The Union alleged that the Medical Center had violated statute, policy, and regulation as a basis for the grievance and request for arbitration. (Attachments 2, 4, and 8). The Union referenced the December 1, 2010 Joint 38 U.S.C. § 7422 Workgroup Recommendations, as Revised and Approved by the Secretary of the Department of Veterans Affairs (Decision Document), which stated as follows under Section B, Compensation: “[N]ot following established VA policy regarding payment of compensation to which

On April 26, 2019, the Medical Center objected to the Union's Notice to Invoke Arbitration, as a matter "concerning or arising out of the establishment, determination, or adjustment of employee compensation" is *per se* non-arbitrable under 38 U.S.C. § 7422 and Article 55, Section 1 of the VA-AFGE Master Agreement. (Attachment 7).

On May 15, 2019, the Medical Center submitted a request for a 38 U.S.C. § 7422 determination. (Attachment 1). The Medical Center indicated that the issue related to the arbitration is outside the scope of collective bargaining per 38 U.S.C. 7422(b), as the adjustments to performance pay relates to the establishment, determination, or adjustment of compensation. *Id.*

On May 28, 2019, the Union submitted its response with supporting documentation to the Medical Center's request. (Attachments 8 and 16). The Union asserted that the VA must follow the criteria for performance pay established in statute, policy, and the VA-AFGE Master Agreement. *Id.* The Union acknowledged that the Medical Center had removed problematic language regarding budget and physician misconduct. *Id.* However, the Union emphasized that the Medical Center had not "disputed" the argument raised that performance guidelines were inconsistent with 38 U.S.C. § 7431 or the VA-AFGE Master Agreement. *Id.* Further, the Union indicated that the Agency adopted the Union's position that the grievance was not barred under 38 U.S.C. § 7422. *Id.* Given this, the Union argued that the grievance process was the only proper forum for addressing the issues in question. *Id.*

AUTHORITY

The Secretary of the Department Veterans Affairs has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health (USH). (Attachment 9).

ISSUE

Whether the grievance and request for arbitration over the Medical Center's FY19 performance pay measures for physicians involves a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

employee is entitled is grievable, including appropriate remedy as determined by the Secretary." (Attachment 10). The Decision Document was not signed by AFGE, the party filing this grievance and arbitration request. *Id.* On August 17, 2018, the VA Secretary rescinded the Decision Document. (Attachment 11). Since the at-issue grievance and request for arbitration were filed after the revocation of the Decision Document, the Union's arguments concerning the Decision Document are not addressed in this decision.

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees, and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation, as determined by the Secretary. 38 U.S.C. § 7422(b).

38 U.S.C. § 7431 sets forth the three elements of physician, podiatrist, and dentist pay in the Veterans Health Administration as base pay, market pay, and performance pay. (38 U.S.C. § 7431(a)). 38 U.S.C. § 7431(d) specifically covers the elements of performance pay. Performance pay is paid “on the basis of the physician’s.... achievement of specific goals and performance objectives prescribed by the Secretary.” (38 U.S.C. § 7431(d)(3)). The amount of performance pay may vary based on the individual achievement of the goals or objectives. (38 U.S.C. § 7431(d)(4)). The amount of performance pay is determined in accordance to regulations but may not exceed the lower of \$15000 or 7.5% of the sum of base and market pay. (38 U.S.C. § 7431(d)(5)). 38 U.S.C. § 7433(a) solely empowers the Secretary “to prescribe regulations relating to the pay of physicians, podiatrists, and dentists in the Veterans Health Administration.” (38 U.S.C. § 7433(a))

The VA-AFGE Master Agreement recognizes the exclusion of Title 38 compensation from bargaining. The VA-AFGE Master Agreement explicitly sets forth in Section 1 of Article 55: *VHA Physician and Dentist Pay*, as follows:

- A. *Compensation is excluded from negotiation under 38 USC 7422. Physician and dentist pay in the VHA is governed by Title 38 of the United States Code and VA Handbook 5007, Part IX.*
- B. *The following language in Sections 2 through 3 is purely for informational purposes and is not itself subject to collective bargaining or grievable under the negotiated grievance procedure. The Secretary’s pay policies will control this matter.*

(Attachment 12 (emphasis added)).

Physician performance pay is addressed in Section 3 of Article 55. However, as noted above, the information is “purely for informational purposes” and not considered to be subject to collective bargaining or grievable. (Attachment 12). The information in Sections 2 and 3 of Article 55 mirrors the information in the section on physician and dentist performance pay in VA Handbook 5007, Part IX, paragraph 12. (Attachment 13). Finally, section 1 of Article 2 also clarifies that applicable federal statutes (e.g. 38 U.S.C. § 7422) govern all matters covered by the VA-AFGE Master Agreement. (VA-AFGE Master Agreement, Article 2, Section 1).

VA Handbook 5007, Part IX generally covers VA policies related to physician and dentist pay. Paragraph 12 covers performance pay and specifically states the following regarding the limits on the amounts payable for performance pay:

c. The amount of performance pay payable to any individual physician or dentist in a fiscal year is determined by the approving official based on the goals and objectives specified for the fiscal year. The amount payable may not exceed the lower of:

- (1) \$15,000, or
- (2) The amount that is equal to 7.5% of the annual pay in effect for the physician or dentist on September 30th of the fiscal year during the period of time under review.

(Attachment 13 (emphasis added)).

Consistent with 38 U.S.C. § 7431, the approving official is provided the discretion to set the performance award at any amount as long as it does not exceed either (1) or (2) above. (38 U.S.C. § 7431(d)(5)). The Union argues that the Medical Center failed to address the arguments regarding 38 U.S.C. § 7431 while acknowledging that responses were given regarding Handbook 5007.² (Attachment 8). However, the policies outlined regarding performance pay in VA Handbook 5007, Part IX, paragraph 12 are based on and consistent with the requirements outlined in 38 U.S.C. § 7431.

The Union further argues that the Medical Center's new, additional criteria for performance pay at the Medical Center would consider not only performance but also "how much money in the hospital budget is allocated to performance pay," which is not covered in statute, VA Handbook 5007, or the VA-AFGE Master Agreement and is therefore in violation of 38 U.S.C. § 7431 and VA Handbook 5007. (Attachments 2, 4, and 8). However, the Union acknowledges that Management removed the reference to budget in the Performance Pay Measures document after the grievance was filed. (Attachments 4 and 8). In addition, no information was submitted to support a finding that the revisions to the performance pay guidelines resulted in performance payments that exceeded, or were less than, \$15000 or 7.5% of a physician's annual pay or were otherwise in violation of 38 U.S.C. § 7431 and VA Handbook 5007. As VA Handbook 5007, part IX, paragraph 12c makes clear, the amount of performance pay is completely at management's discretion so long as the above-referenced totals are not exceeded. (Attachment 13).

The Union also claims that the Agency failed to address the following phrase in VA Handbook 5007, Part IX, Section 12c, "based on the goals and objectives specified for the fiscal year" when addressing the grievance. (Attachments 2, 4, and 8). While the

² While the Union cited to prior 38 U.S.C. § 7422 decisions where the USH concluded that the bargaining or grievance exclusions under 38 U.S.C. § 7422 did not apply because a violation of law or policy was present, that is not the case in this particular matter for the reasons identified herein. (Attachment 8).

Union's grievance focuses on one sentence in the Performance Pay Measures document to support its assertion that the subject matter in question, physician compensation, is grievable and arbitrable, the entirety of the "Performance Pay Measures (FY19)" document prepared by the Medical Center outlines all of the criteria that the Medical Center will be utilizing to determine performance pay. (Attachment 3). For example, Section A of the Performance Pay Measures document addresses the criteria for physicians in the primary care unit. *Id.* Section A1 is titled "Clinical workload" and indicates point values are assigned based on the clinical workload that an individual physician completes in comparison with other physicians. *Id.* Other measures for primary care physicians include "Quality measures" and "Medical record completion criteria". *Id.* The latter measure directly addresses the goal of "leaving not more than 5 patient encounters incomplete for more than 4 days in each of FY 19 Quarters 2, 3, and 4." *Id.* Additionally, the Medical Center provided FAQs covering the revised Performance Pay Measures. (Attachment 5). Based on the foregoing, the grievance and arbitration request by the Union involves a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b)(3).

The USH has previously determined that the criteria for performance pay is excluded from collective bargaining by 38 U.S.C. § 7422. In *VAMC North Texas*, the Union argued that the Medical Center failed to bargain over the "revised criteria used for the performance awards for physicians." (Attachment 14, *VAMC North Texas* (March 15, 2018)). The Secretary concluded that the criteria used for physician performance awards involves a matter or question concerning or arising out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and was excluded from collective bargaining. *Id.*

Similarly, in *VAMC Columbia*, the Union sought to obtain "total pay with breakdown of all individual components of pay to include basic pay, market pay, performance pay, recruitment and retention incentive, incentive awards, and any and all other pay and awards" along with other supporting documentation such as "VA Form 10-0432A which documents the recommendation of total pay and market pay by the Compensation Panel", and the "Curriculum Vitae and other documents used to justify a component of their pay." (Attachment 15, *VAMC Columbia* (April 3, 2015)). The Secretary determined that "[t]he physician pay determinations recommended by the Medical Center's compensation Panel and the related requested pay documentation involve peer review processes and the establishment, determination, or adjustment of employee compensation." *Id.* As such, the Secretary concluded that the information the union requested was excluded from disclosure because it related to a matter or question concerning or arising under 38 U.S.C. § 7422(b). *Id.*

RECOMMENDED DECISION

The issue underlying the grievance and request for arbitration over the Medical Center's FY19 performance pay measures for physicians and dentists involve a matter or question concerning or arising out of the establishment, determination, or adjustment of

employee compensation within the meaning of 38 U.S.C. § 7422(b)], and thus, is excluded from collective bargaining (including any grievance procedures provided under a collective bargaining agreement) and review by any other agency pursuant to 38 U.S.C. § 7422(d).



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Date